



# Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care

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## Summary

An estimated 30,000 children receive Supplemental Security Income (SSI) or other Social Security benefits while in foster care. SSI benefits are available under Title XVI of the Social Security Act for certain disabled children from families with low incomes and minimal assets. Social Security benefits may be paid under Title II of the act to the children of workers who have retired, become disabled, or died.

Federal regulations require that in most cases the Social Security Administration (SSA) select and assign a representative payee—an individual, organization, or government entity—that manages SSI and Social Security payments for children, including those in foster care. Nearly all states designated as the representative payee for a foster child use the child’s benefits to support the child in foster care. In *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler* (hereafter *Keffeler*), the Supreme Court held that the process used by the state of Washington to keep the Social Security benefits received as a child’s representative payee was not prohibited by the Social Security Act. The Court also concluded that the use of funds for reimbursement for foster care services was consistent with the act’s provisions that such funds be spent for the “use and benefit of the beneficiary” and within the regulatory definition of “current maintenance” (i.e., food, clothing, shelter, medical care, and personal comfort items).

Although the *Keffeler* decision supports states’ practice of using SSI and other Social Security benefits for reimbursement of foster care, some child advocates assert that by using these benefits to reimburse the cost of foster care, the state agency denies the child beneficiaries funding that rightly belongs to them. Advocates also raise concern that child welfare agencies are often automatically assigned as the representative payee for foster children. On the other hand, child welfare agencies and other advocates argue that if states were not able to use benefits to pay for a child’s foster care, they would stop screening children to determine their eligibility for these Social Security programs. They further raise the concern that if a foster child’s SSI benefits were allowed to accumulate in a savings account, the child would soon surpass the “means test” for SSI and would lose eligibility for the benefits.

Changes governing how child welfare agencies are assigned as representative payees or how they use the Social Security benefits of foster children would require congressional action. The Foster Children Self-Support Act (H.R. 1104), introduced in February 2007, would prohibit the use of SSI or Title II Social Security benefits to reimburse a state for foster care maintenance payments, require state child welfare agencies to screen foster children for benefits, and for any foster child already receiving benefits, it would also require the state to develop a plan to “conserve benefits not necessary for the immediate needs of the child” to enable the child to “achieve self-support after leaving foster care.” Finally, the bill would exempt these conserved funds from the SSI means test. At least two states—California and New Mexico—have recently proposed legislation to give qualified foster youth some of their SSI or other Social Security benefits. This report will be updated.

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## Introduction

Recent media attention to the case of John G., a North Carolina foster child who receives Social Security Survivors benefits, has renewed debate concerning the use of foster children's Social Security payments to fund their foster care.<sup>1</sup> John G. was at risk of losing the modest house he inherited from his deceased father if mortgage payments are not made. The county in which he resides was designated by the Social Security Administration to manage his Survivors benefits. Arguing that the benefits should be used to cover the costs of his foster care, the county has declined to use them to make the mortgage payments. A county court judge ruled that the county must pay the mortgage, and in November 2007, the Court of Appeals affirmed this ruling.<sup>2</sup>

About 512,000 children were in foster care on the last day of FY2006 due to incidents of abuse, neglect, or other reasons that prevented them from remaining with their parents. Of these youth, approximately 30,000 received Supplemental Security Income (SSI) or other Social Security benefits under Titles II and XVI of the Social Security Act.<sup>3</sup> The Social Security Administration (SSA) may designate a government entity as the representative payee of a foster child if the child's custodial or non-custodial parents, guardians, relatives, stepparents, or a close friend are not available to serve in that role. As the representative payee, the state (like any other representative payee) is required to manage the child's benefits and to use the benefits for the current maintenance (food, clothing, shelter, medical care, and personal comfort items) of the child. Nearly all states use SSI and/or other Social Security benefits to pay for foster care. Among 31 states that were able to report on their use of these benefits in state FY2002, these benefits totaled \$95 million.

In recent years, some child welfare advocates have legally challenged the practice of using foster children's SSI and other Social Security benefits to reimburse states for the cost of providing their foster care. The most prominent case, *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, reached the U.S. Supreme Court, which, in 2003, upheld this practice.<sup>4</sup> Nonetheless, the *Keffeler* decision did raise some questions about the federal government's role in regulating the use of Social Security and SSI payments to fund foster care, and some advocates remain concerned about this use of the benefits.

This report begins with a discussion of the foster care system and the Social Security benefits available to eligible children, including those in foster care. It then describes the role of representative payees and their responsibilities. The report provides data on the use of Social Security benefits to reimburse states for child welfare, and includes a discussion of the *Keffeler*

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<sup>1</sup> Erik Eckholm, "Welfare Agency Seeks Children's Assets," *New York Times*, February 17, 2006, p. A-1.

<sup>2</sup> *In the Matter of J.M.G., appeal docketed*, No. COA06-752 (N.C. Ct. App. June 7, 2006) available at <http://www.aoc.state.nc.us/www/public/coa/dsheets/060752-1.htm>.

<sup>3</sup> This general estimate is based on the Congressional Research Service's analysis of data reported for FY2005 to the Children's Bureau of the U.S. Department of Health and Human Services (HHS) via the Adoption and Foster Care Analysis Reporting System (AFCARS, FY2005). All data from Puerto Rico are excluded because it is not eligible to operate an SSI program. Among the 47 states reporting data, there were 27,116 recipients, or 5.4% of these states' caseloads. However, not all of these data appear plausible. When data from five states (Arizona, California, Maryland, Michigan, and New York), which each reported one half of one percent (or less) of their caseload as SSI/other Social Security benefit recipients, the share of the caseload that might be expected to receive an SSI or other Social Security benefit rises to 7.3%.

<sup>4</sup> *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler*, hereafter *Keffeler*, 537 U.S. 371 (2003).

decision. Finally, the report concludes with proposals supported by some advocates to change the current practice of using SSI and other Social Security benefits to fund foster care (including legislation introduced in the 110<sup>th</sup> Congress), as well as with a discussion of state initiatives to screen all foster children for Social Security and to pass along some benefits to eligible children.

## **Overview of Foster Care**

Foster care is the round-the-clock care of a child outside the child's home and is typically necessary because of neglect or physical abuse of the child by his or her parents. Children who are removed from their homes may be placed in foster family homes, institutions, or group homes by the state child welfare agency.

### **Federal Requirements Applicable to All Foster Care Children**

The federal government has established certain requirements related to state provision of foster care that are applicable to all children in foster care. These include that a state has a written case plan detailing, among other things, where the child is placed and what services are to be provided to ensure that a permanent home is re-established for the child. Further, for each child in foster care, this plan must be reviewed on a regular basis, including a review by a judge no less often than every 12 months. For many children who enter foster care, returning to their parents is the way permanence is re-established. For some children, however, it is not safe or possible to reunite with their parents. In those cases states must work to find adoptive parents or legal guardians who can provide a permanent home and family for these children.

### **Title IV-E Federal Foster Care Program**

Title IV-E of the Social Security Act authorizes the federal foster care program.<sup>5</sup> Under this program, a state may seek federal funds for partial reimbursement of the room and board costs needed to support eligible children who are neglected, abused, or who, for some other reason, cannot remain in their own homes. Funding for the Title IV-E foster care program is appropriated out of the general treasury and is available on an open-ended entitlement basis. This means the federal government is obligated to reimburse states for every eligible cost made on behalf of an eligible child.

More than half a million children are in foster care in the United States on any given day of the year and a little less than half of these (roughly 46% of the daily caseload) are estimated as qualified for federal or Title IV-E foster care support. To be eligible for Title IV-E, a child must (1) meet income/assets tests and family structure rules in the home he/she was removed from;<sup>6</sup> (2)

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<sup>5</sup> Throughout this report, references to Titles, parts or sections of the law refer to the Social Security Act, unless otherwise explicitly stated.

<sup>6</sup> With an exception, discussed below, the income and asset tests, as well as family structure/living arrangement rules are identical to the federal /state rules that applied to the now-defunct cash aid program, Aid to Families with Dependent Children (AFDC), as they existed on July 16, 1996. Under the prior law AFDC program, states established specific AFDC income and asset rules (within some federal parameters). The federal AFDC asset limit was \$1,000, however, P.L. 106-169 raised the allowable counted asset limit to \$10,000 for purposes of determining Title IV-E eligibility. In addition to meeting the income/asset criteria in the home from which he/she was removed, a child must meet the AFDC family structure/living arrangement rules. Those rules granted eligibility primarily to children in (continued...)

have specific judicial determinations made related to reasons for the removal and other aspects of his/her removal and placement; and (3) be placed in an eligible licensed setting with an eligible provider(s).

## Foster Care Maintenance Payment

The state child welfare agency is required to use federal Title IV-E funds to provide a “foster care maintenance payment” to the home or institution where the eligible child is placed to provide for their care and safety. Title IV-E defines a “foster care maintenance payment” as “payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.”<sup>7</sup>

States are allowed to determine how much the total foster care maintenance payment will be for each child, and even within states the amounts may vary considerably based on factors like the child’s age, special needs, or placement setting (e.g. home vs. institution). The portion of each eligible foster care maintenance payment that is reimbursed by the federal government is determined by the state’s Federal Medical Assistance Percentage (FMAP), which may range from 50%, in states with the highest per capita income, to a maximum of 83%, in the lowest per capita states.<sup>8</sup> In FY2006, the most recent year these data are available, states made foster care maintenance payments on behalf of an average of 220,000 Title IV-E eligible children each month at a cost of \$2.9 billion, and claimed federal reimbursement of \$1.6 billion—or roughly 55% of those total maintenance payment costs.<sup>9</sup> For FY2006 then, the total average monthly maintenance payment cost for FY2006 Title IV-E foster care recipients was a little more than \$1,104; of this amount, the federal government reimbursed states roughly \$600.<sup>10</sup>

## Use of child support

Child Support Enforcement is a federal-state program, authorized under Title IV-D, which collects payments from non-custodial parents for the support of their children. In general child support payments received by a foster child who is receiving Title IV-E maintenance payments are used to reimburse the state for the cost of those payments. In FY2006, states collected \$79.3

(...continued)

single-parent families (parents are divorced, separated, or never-married and one spouse is not living with the child; or the parent is dead). In some cases a child in a two-parent family may be eligible (if one parent meets certain unemployment criteria).

<sup>7</sup> Section 475(4)(A) of the act (42 U.S.C. § 675(4)(A). Section 8.3B.1 of the *Child Welfare Policy Manual* of the Children’s Bureau, Administration for Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (hereafter referred to as the *Child Welfare Policy Manual*) further discusses allowable federal foster care maintenance payment costs and is available at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=46](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=46).

<sup>8</sup> Each state’s FMAP is determined annually by a specified formula. For FY2007 the maximum FMAP for Title IV-E foster care purposes is just under 76% (Mississippi). For more information, see <http://aspe.hhs.gov/health/fmap.htm>.

<sup>9</sup> This estimate is based on state Title IV-E foster care expenditure claims for FY2006 as submitted and compiled by the U.S. Department of Health and Human Services (HHS), Administration for Children and Families (ACF), May 2007. Maintenance payment cost reimbursed by child support payments are excluded.

<sup>10</sup> These increases are based on average monthly number of children states reported as eligible for a Title IV-E maintenance payment. Maintenance payment costs reimbursed by child support are excluded, as are all data reported by West Virginia (which had a large number of prior claims reimbursements in FY2006).

million in child support payments made on behalf of children in foster care as reimbursement for foster care maintenance payments. Of this amount, \$43.9 million was sent to the federal government to reimburse its share of the foster care maintenance payment costs.<sup>11</sup>

States are required under the Title IV-E foster care program to “where appropriate,” take all steps necessary to ensure that the rights to any child support payments of a foster child who receives a Title IV-E foster care maintenance payment are assigned to the state.<sup>12</sup>

Rules for the distribution of any child support collected on behalf of a child eligible for Title IV-E foster care maintenance payments are included in Title IV-D.<sup>13</sup> Any support payments received must first be used to reimburse the state for the cost of a foster care maintenance payment (and a portion of these funds must also be sent to the federal government to reimburse some part of its share of the cost). If the monthly child support payment exceeds the amount needed to reimburse the monthly foster care maintenance payment, then the additional funds are to be paid to the state child welfare agency, which must use the funds “in the manner it determines will serve the best interests of the child.”<sup>14</sup> The statute suggests that this might include “setting aside amounts for the child’s future needs or making all or part of the amount available to the person responsible for meeting the child’s daily needs to be used for the child’s benefit.” Third, if any amounts collected exceed these first two required distributions, the remaining amount is again to be distributed to the state for reimbursement (to the state and the federal government) of any past foster care maintenance payments (or Temporary Assistance for Needy Families support) received by the child.

### Other Reimbursable Costs

In addition to the maintenance payment, the Title IV-E foster care program reimburses other eligible costs that are related to case management and child placement services, and other foster care program administrative costs (so long as they are made on behalf of eligible children). In FY2006, the federal share of these costs, commonly referred to as simply “administrative” costs, was \$2.3 billion.<sup>15</sup>

### Support for Foster Children Not Eligible for Title IV-E

More than a quarter of a million children in foster care—that is, children removed from their homes and given over to the care and placement responsibility of the state—do not meet the federal Title IV-E eligibility criteria. The federal government does not explicitly require that a

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<sup>11</sup> U.S. Department of Health and Human Services (HHS), Administration for Children and Families (ACF), state foster care expenditure claim data for FY2005, May 2007.

<sup>12</sup> Section 471(a)(17). Among other reasons, a state may determine that seeking child support payments is not “appropriate” for a foster child, if it might impede efforts to reunite the child with the parent. See *Child Welfare Policy Manual*, Section 8.4C, Question 2.

<sup>13</sup> Section 457(e). See, also, 45 CFR 302.52.

<sup>14</sup> Section 457(e)(2) provides that state “may” use the funds in this manner. However federal regulations (45 CFR 302.52(b)(2)) provide that the funds “must” be used in this manner.

<sup>15</sup> U.S. Department of Health and Human Services (HHS), Administration for Children and Families (ACF), state Title IV-E foster care expenditure claims for FY2005, May 2007. States are also permitted to claim some reimbursement for training costs related to provision of foster care (so long as they are made on behalf of eligible children) and for data collection (without regard to whether or not a child is Title IV-E eligible).



state make a foster care maintenance payment on behalf of these children. Practically speaking, however, placing such a child in an out-of-home setting without providing some reimbursement for the cost of that child is difficult, and in many circumstances might be considered a questionable exercise of the state's responsibility for the child. Accordingly all states provide foster care maintenance payments to children, regardless of the child's Title IV-E eligibility status (although some states do pay lesser amounts to relatives who provide foster care for non-Title IV-E eligible children).<sup>16</sup> In most cases, maintenance payments to support foster children who are not Title IV-E eligible must be supplied by the state (or local) government and cannot be supported by other federal programs, or those programs authorized under Title IV-B of the Social Security Act.<sup>17</sup> States may also seek child support payments on behalf of foster children who are not Title IV-E eligible and may use these funds to reimburse the cost of providing foster care to the child.

To offset the administrative costs (costs related to case management and child placement services, training, data collection and other administrative costs) of providing foster care to children not eligible under Title IV-E, states may use federal funding provided under the Title IV-B programs (all of Child Welfare Services funding, and some of the Promoting Safe and Stable Families funds, combined FY2008 funds of less than \$700 million). However, these children are largely supported in care with non-federal (state or local) dollars.<sup>18</sup>

## Youth Who "Age Out" of Foster Care

Despite the effort to find a permanent home for all foster children, some children reach the age of majority (18 years of age in most states) and thus "age-out" of foster care before a new permanent home is found for them. An estimated 24,400 children "aged-out" of foster care during FY2005.<sup>19</sup> In general, federal Title IV-E funding may not be used for foster care youth who have reached their 18<sup>th</sup> birthday.<sup>20</sup> States, however, are required to provide services to help foster youth make the transition to independent adulthood and are provided some funds (through the Chafee Foster Care Independence Program and a related Education and Training Vouchers program, combined

<sup>16</sup> Under a 1979 U.S. Supreme Court ruling in *Miller v. Youakim* (444 U.S. 125 (1979)), states are not permitted to make a lesser foster care maintenance payment on behalf of a Title IV-E eligible child placed with a relative than the state would pay for that same child if he/she were placed with a non-relative. This rule, however, does not apply with regard to foster care children who are not eligible for Title IV-E foster care support. Under the Temporary Assistance for Needy Families (TANF) block grant, states may provide a "child-only" benefit for relatives (e.g. a grandparent) caring for a child. As long as the grant is solely for the child (no funds are provided for an adult in the household) the income and resources of the relative's home do not need to be considered. However, TANF child-only benefits are typically less generous than foster care maintenance payments.

<sup>17</sup> There are limited situations where federal statute would also permit a state agency to use TANF (Title IV-A) to make foster care payments. However, these federal block grant funds are primarily provided for non-foster care purposes and, in order for the child welfare agency to have access to them must be allocated to the agency (by the state legislature).

<sup>18</sup> Other federal sources of funds, which are not dedicated solely to foster care purposes but which might be accessed for some part of the cost of case planning or services to children in foster care include Title XIX (Medicaid), Title XX (Social Services Block Grant) and Title IV-A (TANF). See Cynthia Scarcella Andrews, et. al, *The Cost of Protecting Vulnerable Children V*, (Washington, DC: Urban Institute), May 2006.

<sup>19</sup> U.S. Department of Health and Human Services, Adoption and Foster Care Analysis Reporting System (AFCARS) Report #13 (Preliminary Estimates for FY2005) (September 2006), p. 4, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report13.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf).

<sup>20</sup> The age limitation on Title IV-E eligibility is created via the program's eligibility link to the now-defunct AFDC program. States may continue to make claims for a youth who has reached his/her 18<sup>th</sup> birthday only if the youth is still completing high school or a GED and has not reached 19 years of age. See, Section 8.3A.2 of the *Child Welfare Policy Manual* available at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=15](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=15).

FY2008 funding of roughly \$185 million) to continue certain independent living services to youth after they leave foster care.<sup>21</sup> With one exception, these funds may not be used for services or activities that assist youth once they have reached their 21<sup>st</sup> birthday and states are limited in the amount of these funds that may be spent for room and board costs.<sup>22</sup>

## Social Security and Supplemental Security Income (SSI) Benefits for Children

Titles II and XVI of the act provide two types of benefits for children, including those in foster care, who meet certain qualifications. Social Security benefits (formally called Old-Age, Survivors, and Disability Insurance benefits) are authorized under Title II of the act. Social Security benefits may be paid to the children of workers who have retired, become disabled, or died.<sup>23</sup> These benefits are paid out of the Social Security Trust Funds. SSI benefits are authorized under Title XVI of the act. SSI benefits are available for certain children with disabilities if their families have low incomes and minimal assets. SSI benefits are paid out of general revenues.<sup>24</sup> All but six states<sup>25</sup> and the Commonwealth of the Northern Mariana Islands supplement the monthly SSI benefit with state or territorial funds.

**Table 1** shows the number of children who receive SSI and other Social Security benefits, as well as the total amount of monthly federal and state supplementary benefits paid to these children.

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<sup>21</sup> These programs are authorized at Section 477 of the act (42 U.S.C. § 677).

<sup>22</sup> States may continue to provide an Education and Training Voucher to a youth already using the program, so long as the youth is successfully enrolled in a post-secondary education or training program, until the youth's 23<sup>rd</sup> birthday. Education and Training Vouchers may be valued at up to \$5,000/year, and these funds may be used to defray any room or board expense that would be considered a "cost of attendance" under Section 472 of the Higher Education Act (20 U.S.C. § 108711). In addition, states may spend no more than 30% of their general Chafee funding for room and board costs of youth who have reached their 18<sup>th</sup> birthday and have not passed their 21<sup>st</sup> birthday.

<sup>23</sup> For more information see the Social Security Administration (SSA) publication *Benefits for Children* available on the website of SSA at <http://www.ssa.gov/pubs/10085.pdf>; and CRS Report RS22294, *Social Security Survivors Benefits*, by Kathleen Romig and Scott Szymendera.

<sup>24</sup> For more information, see the SSA publication *Benefits for Children with Disabilities* available on the website of SSA at <http://www.ssa.gov/pubs/10026.pdf>; and CRS Report RL32279, *Primer on Disability Benefits: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI)*, by Scott Szymendera.

<sup>25</sup> Arkansas, Georgia, Kansas, Mississippi, Tennessee, and West Virginia.

**Table I. All Children Receiving Social Security and SSI Benefits, November 2007**

<b>Program</b>	<b>Number of Children</b>	<b>Total Amount of Monthly Benefits (\$; includes federal benefits and state supplements)</b>
Social Security	4,029,000	2,036,000,000
Supplemental Security Income (SSI)	1,109,000	636,647,000

**Source:** The Congressional Research Service (CRS). Data on Social Security benefits taken from Social Security Administration, *OASDI Monthly Statistics, November 2007* (Washington: GPO 2007), Table 6. Data on SSI benefits taken from Social Security Administration, *SSI Monthly Statistics, Nov. 2007* (Washington: GPO 2007), Tables 2 and 6.

**Note:** Numbers may be rounded.

## Social Security Benefits for Children (Title II)

A child may be eligible for Social Security benefits if he or she is the biological child, adopted child, or dependent stepchild of a person eligible for certain Social Security benefits. In some cases, dependent grandchildren of persons eligible for Social Security benefits may also be eligible for benefits. In order to qualify for benefits, the child must be unmarried and have a parent that meets one of the following conditions:

- the parent is disabled or retired and is entitled to either Social Security old age (i.e., retirement) or disability benefits; or
- the parent is deceased and was fully insured for Social Security benefits based on work history at the time of death.

Social Security benefits for children are intended to replace the household income lost due to retirement, disability, or death that might otherwise have been spent to provide for dependent children unable to care for themselves or earn their own money through work.

## Benefit Amounts for Children

Children who qualify for Social Security benefits may receive up to 50% of a living parent's full retirement or disability benefit or 75% of the deceased parent's Social Security benefit. Benefits for children are subject to the family maximum rules which limit the total amount of benefits available to any one family to between 150% and 180% of the parent's full benefit amount. If the total amount of all family benefits exceeds this maximum amount, then the benefit of each person, except the parent, is reduced proportionately.

## When Children's Benefits Stop

An eligible child may receive Social Security benefits until the child reaches the age of 18, or 19 if the child is still in high school. Benefits may continue during adulthood if the child has a disability that began before he or she turned 22. Children's benefits terminate upon the marriage of the child at any age.

## SSI Benefits for Children (Title XVI)

A child with a severe disability may be eligible to receive SSI benefits regardless of the work history or benefit status of his or her parents.<sup>26</sup> In order to qualify for SSI benefits, the child must meet the statutory definition of disability, and the income and resources of the family must fall below limits set in Title XVI of the act.

A child is considered disabled for the purposes of SSI eligibility if that child meets each of the following three conditions:

- the child must have a physical or mental impairment that results in “marked and severe functional limitations;”<sup>27</sup>
- the child must have a condition that has lasted or is expected to last at least 12 months or result in death; and
- the child must either earn less than the substantial gainful activity amount (\$940 per month for 2008) or not work.

SSI benefits are designed to provide a minimum level of monthly income to disabled persons and families with disabled children who have limited means and limited other options for financial assistance. A child must fall below the income and resources limits established by the SSI program. Since children rarely have income or resources of their own, the Social Security Administration (SSA) uses a process called “deeming” to assign part of the value of the income and resources of the parents to disabled children for the purposes of determining SSI eligibility. In order to qualify for SSI benefits, a child’s countable deemed income and assets must fall below program guidelines.<sup>28</sup> Children living in foster care do not have the income of the family they are living with deemed to them and this income is not counted against them when determining SSI eligibility. SSI income limits vary by state and type of income.

Once a child in the SSI program reaches age 18, his or her case is reviewed by SSA to determine if he or she meets the SSI disability standard for adults, which is based on an inability to perform work rather than functional limitations. At age 18, the income and resources of parents are no longer considered available (i.e., deemed) to a child.

## SSI Asset Limits and Assets Not Counted As Resources in the SSI Program

The countable resource limit for SSI eligibility is \$2,000 for individuals and \$3,000 for couples. These limits are set by law, are not indexed for inflation, and have been at their current levels since 1989.<sup>29</sup> In most cases, the resources of the family that a child lives with are counted as the child’s resources when determining his or her SSI eligibility. However, children living in foster

<sup>26</sup> SSI benefits are not available to residents of Puerto Rico, Guam, or the United States Virgin Islands. Residents of these jurisdictions are eligible to receive federal benefits from their commonwealth or territorial government under provisions of Title XIV and Title XVI of the Social Security Act. These benefits are administered by the U.S. Department of Health and Human Services.

<sup>27</sup> 42 U.S.C. § 1382c(a)(3)(C)(I).

<sup>28</sup> The rules for deeming of income and resources are complex and can vary by state. For more information see the SSA publication *Understanding Supplemental Security Income (SSI)* available on the website of SSA at <http://www.socialsecurity.gov/notices/supplemental-security-income/text-understanding-ssi.htm>.

<sup>29</sup> 42 U.S.C. § 1382(a).

care are considered to be living on their own and the resources and income of the household they are living in are not considered when determining their SSI eligibility. Not all resources are counted for the purposes of determining SSI eligibility. The Social Security Act and federal regulations provide various types of resource exclusions that allow individuals or couples to own certain assets and not have them counted against their \$2,000 or \$3,000 resource limit.<sup>30</sup>

The SSI resource rules make it difficult for beneficiaries to accumulate assets while receiving benefits. Children who receive SSI benefits cannot build up savings for use during adulthood or to pay for post-secondary education expenses without jeopardizing their eligibility for SSI benefits. Like other children who receive SSI benefits, foster children beneficiaries cannot retain eligibility for those benefits if they build up a pool of money in excess of \$2,000 to assist in their transition into adulthood and independent living.<sup>31</sup>

### ***Dedicated Accounts for Children***

When a child SSI beneficiary is owed back SSI benefits of more than six months, his or her representative payee is required to place those benefits in a dedicated account at a financial institution.<sup>32</sup> The representative payee may use the money from the dedicated account for the medical care; education and training needs of the child; personal needs assistance, special equipment, and housing modifications; or therapy for the child based on his or her disability.<sup>33</sup> Money from a dedicated account cannot be used for the daily expenses, food, clothing, or shelter of the child. Money in a dedicated account for children is not counted as a resource for the purposes of determining the child's SSI eligibility.

## **Representative Payees in the Social Security System**

Although most Social Security and SSI payments are made directly from SSA to the beneficiary, the Social Security Act allows the agency to make payments to a representative payee acting on the beneficiary's behalf. This representative payee may be an individual, organization, or a state/local agency working on behalf of the beneficiary and must meet strict guidelines established in the act.<sup>34</sup> Individuals acting as representative payees may not charge a fee for their services. However, organizations serving in this capacity can charge a small fee to cover administrative costs associated with handling payments.

Over 7.5 million Social Security and SSI beneficiaries receive payments through a representative payee each month. The use of representative payees is more prevalent in the SSI program as 36%

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<sup>30</sup> The SSI resource exclusions can be found in Section 1613 of the act (42 USC § 1382b) and in the Code of Federal Regulations at 20 CFR §§ 416.1210-416.1239.

<sup>31</sup> Under Section 472(a) of the Social Security Act, foster children who receive Title IV-E foster care maintenance payments and do not receive SSI may accumulate up to \$10,000 in assets. See page 25 for further discussion of this provision.

<sup>32</sup> Back benefits are often the result of delays in the disability determination process. For additional information see CRS Report RL33374, *Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI): The Disability Determination and Appeals Process*, by Scott Szymendera.

<sup>33</sup> Other items, approved in advance by the SSA, may be purchased using money from a dedicated account.

<sup>34</sup> These guidelines, as well as procedures used by SSA to ensure compliance are found in Sections 205(j) and 1632(a)(2) of the act (42 U.S.C. §§ 405(j) and 1383(a)(2)).

of SSI beneficiaries have a representative payee while only 11% of Social Security beneficiaries receive their benefits through a representative payee.<sup>35</sup>

## Representative Payees for Children Receiving Benefits

Federal regulations state that in most cases SSA will assign a representative payee for children who receive Social Security or SSI benefits.<sup>36</sup> Exceptions may be made and payments may be given directly to the child if he or she is nearing age 18, serving in the military, supporting himself or herself, or is a parent. In addition, children under 18 who receive Social Security disability benefits because of their own work history and disability may receive benefits without a representative payee.

## Order of Selection of Representative Payees

It is the responsibility of SSA to select the person or organization who will serve as a representative payee. The regulations provide for an order of selection to guide the agency in selecting a payee.<sup>37</sup> The order of selection is just a guide and in all cases the best interests of the beneficiary are to be considered when assigning a representative payee. The order of selection for children receiving benefits:

- First: A natural or adoptive parent who has custody, or a legal guardian.
- Second: A natural or adoptive parent who does not have custody, but who is contributing to the support of the child and is demonstrating a strong concern for the well being of the child.
- Third: A natural or adoptive parent who does not have custody, and who is not contributing to the support of the child but is demonstrating a strong concern for the well being of the child.
- Fourth: A relative or stepparent who has custody of the child.
- Fifth: A relative or stepparent who does not have custody, but who is contributing to the support of the child and is demonstrating a strong concern for the well being of the child.
- Sixth: A relative or close friend of the child who does not have custody but is demonstrating concern for the well being of the child.
- Seventh: An authorized social services agency or custodial institution.

As shown in **Table 2**, a child's natural or adoptive parents act as representative payees in nearly 82% of SSI cases. Grandparents and other relatives act as payees for children in nearly 14% of cases while social service agencies act as representative payees for children in the SSI program in 2% of cases.

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<sup>35</sup> Social Security Administration, Office of the Inspector General, *Follow-Up Audit: Information System Controls of the Social Security Administration's Representative Payee System, June 2006*. Available on the website of the SSA at <http://www.ssa.gov/oig/ADOBEPDF/A-14-06-16114.pdf>.

<sup>36</sup> 20 C.F.R. §§ 404.2010 and 416.610.

<sup>37</sup> This order of selection differs for adults, adults with drug or alcohol problems, and children. The complete orders of selection can be found at 20 C.F.R. §§ 404.2021 and 416.621.

**Table 2. Types of Representative Payees for Children in the SSI Program, December 2005**

Type of Payee	Number of SSI Children	Percent of All SSI Children
No payee	816	0.1
Natural or adoptive parents	880,777	81.6
Spouse	50	0.0
Natural, adoptive, or stepchild	397	0.0
Grandparent	73,278	6.8
Other relative	76,264	7.1
Non-mental institution	6,292	0.6
Mental institution	2,646	0.2
Financial organization	169	0.0
Social services agency	20,013	1.9
Public official	1,368	0.1
Other	16,907	1.6
<b>Total</b>	<b>1,078,977</b>	<b>100.0</b>

**Source:** Table prepared by Congressional Research Service (CRS) based on Social Security Administration, *SSI Annual Statistical Report, 2004*, (Washington: GPO 2005), Table 6.

**Note:** Numbers may not add up due to rounding. On the basis of January 2007 correspondence with SSA staff, the agency does not define each type of representative payee.

The SSA's Program Operations Manual System (POMS), which provides internal guidance for SSA employees, specifies that when a social service agency is awarded custody of a child who is removed from the custody of a parent, the agency retains custody regardless of whether the child is placed in a foster home or group living household.<sup>38</sup> The POMS advises that the social service agency should not be routinely appointed as representative payee, and that SSA employees should consider a number of factors in assigning a payee:

- how the social services agency became responsible for the child;
- whether the child is expected to return to the custody of a parent, and if so, when;
- the source of the child's support;
- who has physical custody of the child;
- the nature and extent of the child welfare agency's care;
- whether the agency has temporary or permanent custody;
- whether parental rights have been terminated; and
- whether there are concerned relatives and friends.

<sup>38</sup> POMS GN 00502.159.

## Responsibilities of Representative Payees

The responsibilities of child welfare agencies serving as representative payees for child beneficiaries are the same as those of other types of payees. The representative payees' major statutory and regulatory obligations involve how the beneficiaries' benefits are managed.

### Statutory Responsibilities

Sections 205(j)(1)(A) and 1632(a)(2)(A)(I) of the act specify that SSA may assign a representative payee to a beneficiary if the agency determines the "interest of the individual" beneficiary would be served by such an assignment. The act further specifies that the payment to the representative payee must be used for the "use and benefit" of the beneficiary.<sup>39</sup>

### Regulatory Responsibilities

Federal regulations require that a representative payee "use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines ... to be in the best interests of the beneficiary."<sup>40</sup> The regulations then define the concept of "use and benefit of the beneficiary" by stating:

We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.<sup>41</sup>

### Special Rules Concerning Creditors and Debts

Sections 205(j)(2)(C)(i)(III) and 1631(a)(2)(B)(iii)(III) of the act prohibit creditors who provide goods and services to the beneficiary from serving as that beneficiary's representative payee.<sup>42</sup> However, Sections 205(j)(2)(C)(iii)(III) and 1631(a)(2)(B)(v)(III) of the act make an exception to this provision if the creditor is "a facility that is licensed or certified as a care facility under the law of a State or a political subdivision of a State."<sup>43</sup>

The regulations also include rules regarding the payment of debts to creditors and specify that "A payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met."<sup>44</sup>

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<sup>39</sup> 42 U.S.C. §§ 405(j)(1)(A) and 1383(a)(2)(A)(I).

<sup>40</sup> 20 C.F.R. §§ 404.235(a) and 416.635(a).

<sup>41</sup> 20 C.F.R. §§ 404.2040(a) and 416.640(a).

<sup>42</sup> 42 U.S.C. §§ 405(j)(2)(C)(i)(III) and 1383(a)(2)(B)(iii)(III).

<sup>43</sup> 42 U.S.C. §§ 405(j)(2)(C)(iii)(III) and 1383(a)(2)(B)(v)(III).

<sup>44</sup> 20 C.F.R. §§ 404.2040(d) and 416.640(d).



## Social Security and SSI Benefits for Children in Foster Care

About 517,000 children were in foster care on the last day of FY2004.<sup>45</sup> An estimated 30,000 of these foster children received Supplemental Security Income (SSI) or other Social Security benefits.<sup>46</sup> The majority of these children are presumed to be SSI eligible.<sup>47</sup> In December 2006, just over two-thirds of all children who received an SSI benefit were diagnosed with a “mental disorder” (17.9% with mental retardation and 49.6% with an “other” mental disorder).<sup>48</sup> Most of the remaining recipients were diagnosed with a serious health condition.

### SSI-Eligible Foster Children

Compared to children in the general population, children in foster care have greater physical and mental health and developmental needs. Recent data from the National Survey of Child and Adolescent Well-being (NSCAW) found that more than one-quarter of children in foster care for one year were reported by their care-givers to have a recurring physical or mental health problem. The same study also found that “the vast majority of children who have spent one year in out-of-home care have substantial social and cognitive impairments.”<sup>49</sup>

Given their health and mental health needs—and the fact that most foster children would be expected to meet the income and resources requirements for SSI receipt—it is possible that at least some foster children who would be eligible for SSI are not receiving benefits. This may be attributable to two factors. First, not all children in foster care may have been screened for SSI eligibility. Among the 25 states that responded to a recent American Public Human Services Association (APHSA) survey of state child welfare agencies regarding their SSI screening practices, 18 reported “routinely” screening foster children for SSI eligibility while the remaining seven indicated that screening might be done but was not routine.<sup>50</sup> An agency may also decide not to pursue SSI eligibility for a given foster child, if the agency determines receipt of a Title IV-E federal foster care benefit better serves the child. On the other hand, SSI eligibility, once determined, may be maintained into adulthood (with re-determinations) where eligibility for a foster care maintenance payment ceases generally at, or soon after, a youth’s 18<sup>th</sup> birthday.

<sup>45</sup> AFCARS Report #11, p. 1. This estimate includes data from all 50 states, the District of Columbia and Puerto Rico. A

<sup>46</sup> Congressional Research Service (CRS) analysis of data reported for FY2004 to the Children’s Bureau of the U.S. Department of Health and Human Services (HHS) via the Adoption and Foster Care Analysis Reporting System (AFCARS). (See footnote 4 of this report.)

<sup>47</sup> There are no separate AFCARS data on SSI receipt alone. Instead, states are asked to report whether a child receives SSI or “other” Social Security benefits. For purposes of AFCARS “other Social Security benefits” are generally those described as Title II Social Security benefits in this report.

<sup>48</sup> Social Security Administration, Office of Policy, *Children Receiving SSI, 2006*, (2007), Table 8.

<sup>49</sup> U.S. Department of Health and Human Services, Administration for Children and Families, National Survey of Child and Adolescent Well-being (NSCAW), *One Year in Foster Care, Wave 1 Data Analysis Report*, (Washington: GPO 2003), pp. 13, 20. See also Susan dos Reis, et al, “Mental Health Services for Youths in Foster Care and Disabled Youths.” *American Journal of Public Health*, July 2001, pp.1094-1099; and Susan Kools and Christine Kennedy, “Foster Child Health and Development: Implications for Primary Care,” *Pediatric Nursing*, January-February 2003, pp. 39-46.

<sup>50</sup> Informal survey conducted by APHSA. Data provided to CRS in personal communications. Most states said that the procedures used to make applications were applicable on a statewide (as opposed to county level) basis and, at least nine states said that the child’s expected length of stay in foster care was a factor in the procedures.

## Concurrent Receipt of Benefits

The *Child Welfare Policy Manual*, which discusses official guidance (including law, regulations, and policies) on the Title IV-E foster care program, states that there is no prohibition against claiming both an SSI benefit and a Title IV-E supported foster care maintenance payment.<sup>51</sup> However, the policy manual notes that the amount of the foster care maintenance payment received will reduce a child’s SSI benefit, dollar for dollar. Thus if a child’s total monthly foster care maintenance payment is \$500—and that maintenance payment is in part paid with federal Title IV-E dollars—then the child’s SSI benefit would be reduced by \$500.<sup>52</sup>

For children in foster care who do not qualify for Title IV-E foster care support, states must find other sources of funding to pay for that child. Most non-Title IV-E eligible children in foster care must be supported with state or local dollars. Such payments generally do not reduce an SSI-eligible foster child’s federal SSI benefit because they are not counted as income.<sup>53</sup> Typically, however, a state, acting as the child’s representative payee, uses SSI or Social Security benefits to provide a foster care maintenance payment to the child (or to reimburse itself for that payment).

Addressing the question about whether to apply for either or both Title IV-E and SSI benefits, the *Child Welfare Policy Manual* counsels careful review of benefits available under each program “so that an informed choice can be made in the child’s best interest.” It adds that “to achieve this goal, title IV-E agencies should exchange information regarding eligibility requirements and benefits with local Social Security district offices and establish formal procedures to refer clients and their representative to the local Social Security district office for consultation and/or application when appropriate.”<sup>54</sup> The dollar value of the respective benefit is often a consideration.<sup>55</sup>

The eligibility for and amount of Title II benefits are not affected by receipt of foster care. Social Security benefits are paid under Title II to the children of workers who have retired, become disabled, or died. Their eligibility is determined by their parents’ participation in the workforce. Because both SSI and Title IV-E foster care have income- and resources-related eligibility criteria, children who are recipients of other (i.e. Title II) Social Security benefits may be less likely to qualify for either of the means-tested programs.

## Use of SSI and Other Social Security Benefits by Child Welfare Agencies

Most, if not all, states use Social Security and/or SSI benefits of children in foster care as a source of federal funds for their foster care programs. Exactly how much child welfare funding is derived from these benefits is uncertain. When the Urban Institute surveyed state child welfare

<sup>51</sup> The *Child Welfare Policy Manual* is issued by the U.S. Department of Health and Human Services, Administration for Children and Families.

<sup>52</sup> Section 8.4D - Question 1 of the *Child Welfare Policy Manual*. At the same time, a state may make Title IV-E *administrative* claims on behalf of a child who is Title IV-E eligible but who is also SSI-eligible and receives only an SSI benefit and this federal program support will *not* reduce the SSI benefit. (See Question 3 of the same Section.)

<sup>53</sup> POMS SI 00830.410.

<sup>54</sup> Section 8.4D - Question 2, *Child Welfare Policy Manual*.

<sup>55</sup> APHSA survey.

agency spending for state fiscal year (SFY) 2002, only two states reported *not* using either of these funding streams (North Dakota and Virginia).<sup>56</sup> However, only 30 states and the District of Columbia—representing roughly 40% of the FY2002 foster care caseload—were able to provide some data on the amount of SSI and Title II benefits used by the state child welfare agency.<sup>57</sup>

Among the states that provided data to the Urban Institute, Social Security and SSI benefits made up \$95.4 million in funding for child welfare, with SSI benefits making up the largest share of this funding. Assuming all states spent these funds at roughly the same rate as those that reported data, total use of SSI and Survivors benefits by state child welfare agencies would be roughly \$156 million.<sup>58</sup>

Although not insignificant, this spending represents a relatively small share of the of \$22.4 billion in spending reported by child welfare agencies for SFY2002 (roughly half of these expended funds, \$11.3 billion, were federal dollars). On average, among the state child welfare agencies that reported data on the use of SSI and/or Survivors benefits, these benefits represented less than 1% of the federal dollars spent (0.85%) and less than one half of one percent of their total spending (0.43%).<sup>59</sup>

**Table 3** shows the reported data on the amount of SSI and Social Security survivor benefits states used to fund child welfare in SFY2002. Please note the following: (1) states that used these funding sources but were not able to provide data on the amount for either category are not listed in this table; (2) some states reported combined data for SSI and Survivors and these are presented in a single table cell; and (3) an amount of \$0 indicates that the state did not use any funds for this purpose in SFY2002 while a dash means the state reported using this funding source but could not provide data on the amount.

<sup>56</sup> Separately, Arkansas reported that it did not use any SSI benefits and Arizona and New Mexico reported using no Survivors Social Security benefits.

<sup>57</sup> States that reported using both SSI and Survivors benefits in SFY2002 but which were unable to provide data on the amount of spending from either source are: Alabama, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nevada, New York, North Carolina, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin. These states represented 58.4% of the FY2002 foster care caseload. Separately, Texas, Indiana, and the District of Columbia reported using both funding sources but could only report data on SSI benefits used. Indiana reported using both funding sources but could only provide data on Survivors benefits and Arkansas reported that it used Survivors benefits but could not provide data.

<sup>58</sup> This estimate was made by the Congressional Research Service (CRS) by calculating the average annual dollar amount per child in foster care that was spent from SSI/Survivors benefits among states reporting data (\$303) and applying that dollar amount to the number of children in foster care from non-reporting states.

<sup>59</sup> Cynthia Andrews Scarcella, et al., *The Cost of Protecting Vulnerable Children IV*, Urban Institute: Washington, DC, 2003, pp. 10, 27-28.

**Table 3. Social Security and SSI Benefits as Funding Stream for Child Welfare Spending, SFY2002**

State	Amount of Funds Spent from—		SSI - Title II Benefits Used as Share of State Child Welfare Agencies—	
	SSI Benefits (\$)	Title II Benefits (\$)	Total Spending (%)	Federal Spending (%)
Alaska	790,956	0	0.96	2.53
Arizona	309,200	580,800	0.34	0.56
Arkansas	0	—	0.00	0.00
Delaware	247,793	182,178	0.84	2.09
District of Columbia	398,641	—	0.18	0.52
Florida	9,570,004	204,081	1.28	2.24
Illinois	13,555,100	4,387,300	1.31	7.34
Indiana	—	7,985,714	2.08	2.18
Iowa	3,084,336	—	0.97	2.18
Kentucky	3,216,495	1,454,131	1.41	3.67
Louisiana	1,925,682	1,036,905	1.44	2.44
Maine	813,583	1,047,943	1.30	3.10
Massachusetts	4,397,642	—	0.69	1.76
Missouri	4,423,521	2,883,490	1.50	2.41
Montana	600,000	—	1.34	2.76
Nebraska	1,944,853	—	1.35	3.07
New Hampshire	513,746	442,301	1.20	2.80
New Jersey	1,009,085	1,054,484	0.45	1.09
New Mexico	1,048,300	0	1.35	2.39
North Dakota	0	0	0.00	0.00
Oklahoma	3,725,123	—	1.91	2.97
Oregon	3,154,287	1,719,970	1.88	2.79
Rhode Island	835,988	417,368	0.75	1.61
South Carolina	1,800,000	—	0.75	1.06
South Dakota	483,138	—	1.22	2.08
Tennessee	4,823,345	—	1.13	2.57
Texas	7,375,932	—	0.91	1.39
Utah	644,900	87,900	0.61	1.27
Vermont	878,339	—	1.29	1.96

State	Amount of Funds Spent from—		SSI - Title II Benefits Used as Share of State Child Welfare Agencies—	
	SSI Benefits (\$)	Title II Benefits (\$)	Total Spending (%)	Federal Spending (%)
Virginia	0	0	0.00	0.00
Wyoming	214,483	161,861	1.25	2.46
<b>Total</b>	<b>71,784,472</b>	<b>23,646,426</b>	<b>0.43</b>	<b>0.85</b>

**Source:** Congressional Research Service (CRS) table based on revised data provided by the Urban Institute from its survey of state child welfare agency spending for state fiscal year (SFY) 2002.

**Note:** Percents of total or federal spending are calculated with data provided and for some states are based on partial data. The following 20 states indicated using both types of benefits (SSI and Title II) in SFY2002 but could not provide data on the amount of funds used and are not included in this table: Alabama, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nevada, New York, North Carolina, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

## Keffeler Decision

In recent years, some child welfare advocates have legally challenged states' practice of using foster children's SSI and Title II benefits to reimburse the cost of providing foster care to those children. The most prominent case, *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, reached the U.S. Supreme Court in 2002. The Supreme Court ruled unanimously (in 2003) that the state of Washington could, as the representative payee for a foster child receiving Social Security or SSI benefits, use the child's benefits to reimburse itself for the cost of that child's foster care.<sup>60</sup> This case reached the U.S. Supreme Court on the appeal of the state of Washington, which was seeking to overturn the previous ruling of the Washington State Supreme Court (discussed below).

### The Decision of the Washington State Supreme Court

In 2001, the Washington State Supreme Court ruled in *Guardianship Estate of Danny Keffeler v. Department of Social and Health Services* that the state of Washington's service as a representative payee for children in foster care violated the anti-attachment clause of the Social Security Act.<sup>61</sup> In its decision, the Washington State Supreme Court stated that "the facial logic of DSHS's reimbursement scheme demonstrates a creditor relationship, a relationship involving creditor-type acts, vis-à-vis foster children and their SSA benefits." The Washington State Supreme Court also cited, among other cases, the decision of the Ninth Circuit in *Brinkman v. Rahm* that prohibited the state of Washington from deducting Social Security payments as reimbursement for the costs associated with the care of persons with mental illnesses involuntarily confined to state hospitals.<sup>62</sup>

While the Washington State Supreme Court did not directly rule on whether the actions of the Washington Department of Social and Health Services as a representative payee violated other

<sup>60</sup> *Keffeler*, 537 U.S. 371 (2003).

<sup>61</sup> 145 Wn.2d.1 (2001).

<sup>62</sup> 878 F.2d. 263 (9<sup>th</sup> Cir. 1989).

sections of the Social Security Act, it did discuss whether the state was acting in the best interest of the child entitled to benefits. The Washington State Supreme Court stated that a child in foster care is “better off with any payee other than the state because the state must provide foster care under state law regardless of whether it receives reimbursement” and that “we seriously doubt using the SSA benefits to reimburse the state for its public assistance expenditure is in all cases, or even some, ‘in the best interests of the beneficiary.’”

## The Opinion of the Supreme Court

Justice Souter wrote the unanimous opinion of the Court, which sided with the Washington State Department of Social and Health Services and overturned the decision of the Washington Supreme Court. The U.S. Supreme Court stated that the state could not be a foster child’s creditor since the foster child did not have an obligation to pay for his or her foster care.<sup>63</sup> Instead, the question raised by the case, the Court stated was “whether the department’s efforts to become a representative payee, or its use of respondents’ Social Security benefits when it acts in that capacity amounts to employing an ‘execution, levy, attachment, garnishment or other legal process’,” to gain control of the children’s Social Security benefits.<sup>64</sup> On the question of this alleged violation of what is commonly called the “anti-attachment clause”—the Court held that neither the process used by Washington state to become a representative payee for children in foster care who were recipients of SSI or Social Security benefits, nor its use of those benefits to reimburse the cost of their foster care, violated the anti-attachment clause.<sup>65</sup> The Court further noted that the use of funds to reimburse the Washington State Department of Social and Health Services for foster care was consistent with the regulatory requirement that such funds be spent for the “use and benefit of the beneficiary” and with the regulatory definition of “current maintenance” that includes “costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.”<sup>66</sup>

The U.S. Supreme Court further asserted that the “real basis” of the respondent’s objection in the case (and the previous Washington State Supreme Court’s holding in the case) was the “view that allowing a state agency to reimburse itself for the costs of foster care is antithetical to the best interest of the beneficiary foster child.”<sup>67</sup> Responding to this issue, the Court first relied on the settled principle of administrative law that an open-ended and potentially vague term, such as “best interest” is “highly susceptible to administrative interpretation subject to judicial deference.”<sup>68</sup> Thus, it noted that SSA has the authority to determine, through regulation, how it will interpret this part of the law. The Court then concluded that SSA’s regulations on this issue are consistent with the basic objectives of the law authorizing the SSI and Social Security programs. Specifically, those are to provide a minimum level of income, and the basic objective of the Social Security program is to provide income required for ordinary and necessary living expenses.<sup>69</sup> The Social Security Commissioner, the Court wrote, “has decided that a

<sup>63</sup> *Keffeler*, 537 U.S. 371 (2003), pp. 8-10.

<sup>64</sup> *Ibid.*, p. 9, which cites Section 207(a) of the act (42 U.S.C. § 407(a)). This section of the act is commonly referred to as the anti-attachment clause because it protects Social Security benefits from “execution, levy, attachment, garnishment, or other legal process.”

<sup>65</sup> *Keffeler*, 537 U.S. 371 (2003), pp. 12-13.

<sup>66</sup> *Ibid.*, pp. 13 -14, referencing, 20 C.F.R. § 404.2040 and 20 C.F.R. §416.640(a).

<sup>67</sup> *Ibid.*, p. 16.

<sup>68</sup> *Ibid.*, p. 17.

<sup>69</sup> As provided in federal regulations, the stated purpose of the SSI program is to “assure a minimum level of income (continued...) ”

representative payee serves the beneficiary's interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants."<sup>70</sup>

## Should SSI and Other Social Security Benefits Be Used to Pay for Foster Care?

The *Keffeler* decision affirmed the right of states (under current law) to both act as representative payees for children in foster care who are recipients of federal Social Security and SSI benefits and further to use those benefits to reimburse the cost of foster care. State child welfare agencies and many child welfare advocates applauded the decision; other advocates remain concerned that the practice of states using foster children's SSI or Social Security benefits to pay for foster care does not serve these children's best interests.<sup>71</sup>

### Benefits Should Not be Used for Foster Care

Some legal advocates argue that the state agency is more interested in gaining federal funds than it is in ensuring that a child's benefits serve his/her best interests, and that a child's benefits are not necessarily used to benefit just the child but may simply defray child welfare or foster care expenses for the state generally.<sup>72</sup> Further, they argue that even the practice of applying the benefits solely for the beneficiaries' foster care costs amounts to asking children to pay for their own stay in foster care, while other children in care (including those with assets or income other than Social Security or those who receive Social Security benefits but have a representative payee other than the child welfare agency) are not required to repay the costs.<sup>73</sup> Additionally some advocates are concerned that child welfare agencies may be automatically assigned as the representative payee for children in foster care, even though (under SSA's own regulations) the

(...continued)

for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level "(20 C.F.R. § 416.110). The stated purpose of the Social Security benefit programs is to provide beneficiaries with "income required for ordinary and necessary living expenses" (20 C.F.R § 404.508(a)).

<sup>70</sup> *Keffeler*, 537 U.S. 371 (2003), p. 17.

<sup>71</sup> For a summary of the arguments made by the opposing sides in this case see Elizabeth Oppenheim, "Funding for Children in Foster Care: The Keffeler Case," *Policy & Practice of Public Human Services*, March 2003, pp. 22-28.

<sup>72</sup> Patrick Gardner, "Keffeler v DSHS: Picking the Pockets of America's Neediest Children," *Youth Law News*, July-September, 2002, p. 12. (Hereafter "Picking the Pockets.") In its *Keffeler* opinion, the U.S. Supreme Court noted that Keffeler charged the state with "failing to exercise discretion in how it uses benefits, periodically 'sweeping' beneficiaries' accounts to pay for past care and 'double dipping' by using benefits to reimburse the state for costs previously recouped from other sources." These charges, the Court noted were "far afield" of the issue on which it had agreed to hear the case. It noted, however, that these alleged improper uses of payments were concerns that could be brought to the Commissioner on Social Security "who bears responsibility for overseeing representative payees or elsewhere as appropriate." Subsequently, the Washington State Supreme Court, in *Guardianship Estate of Danny Keffeler v. The Department of Social and Health Services* (151 Wn. 2d. 331 (2004), a case that looked at certain constitutional claims made by *Keffeler*, concurred with the U.S. Supreme Court.

<sup>73</sup> Daniel L. Hatcher, "Foster Care Children Paying for Foster Care," *Cardozo Law Review*, vol. 27, no. 4 (2006), p. 1835. (Hereafter "Foster Care Children Paying for Foster Care"). Lawyers on behalf of Keffeler argued that differences between foster children with private representative payees and those with agency representative payees amounted to a violation of the Constitution's equal protection clause. Those claims were addressed in the 2004 decision, by the Washington Supreme Court (145 Wn. 331). The court disagreed noting that the duties of the representative payees were the same in any case.

agencies should be the least preferred representative payee. Related to this concern, some advocates suggest that SSA does not perform adequate investigations to determine whether a more suitable payee is available.<sup>74</sup> Further, according to some legal advocates, agencies that receive a poor review by SSA or fail to submit payee accounting reports to SSA continue to serve as payees.<sup>75</sup>

Rather than paying for a child's foster care, these advocates argue that any SSI and other Social Security benefits that a child is eligible to receive should be invested or otherwise saved for the child's future use (e.g., education, housing). Youth who leave foster care without a permanent home, typically at age 18, often have a difficult time securing housing and income sufficient to shelter and support themselves. SSI-eligible foster care youth who exit foster care would arguably have an even more difficult time and thus may need additional resources that SSI provides (albeit some youth may continue to be eligible for SSI at age 18 and beyond).<sup>76</sup> Providing benefits to eligible youth upon leaving care would ease the transition to adulthood for these youth at a time when they are expected to become financially independent.

### Benefits Should Be Used for Foster Care

State child welfare agencies and many child welfare advocates, however, assert that these federal funds are critical for child welfare agencies operating on tight budgets and that use of SSI and Title II benefits to pay for the cost of current maintenance, is consistent with the federal purpose for providing those funds. (Further, the use of these child-specific funds to reimburse foster care costs is consistent with federal policy for use of child support paid on behalf of the child by the non-custodial parent(s).) Some child welfare advocates argue that states have expended benefits for these provisions in good faith, just as a parent serving as a representative payee would. Thus, states should not be held to a different standard than parents or other representative payees.<sup>77</sup> In addition, state child welfare agencies and advocates argue that returning benefits to children that were already used to pay for their maintenance could cost states up to hundreds of millions of dollars.<sup>78</sup> In *Keffeler*, the Supreme Court cited the *Amici Curiae* briefs filed by the Children's Defense Fund (along with Catholic Charities USA, the Child Welfare League of America, and the Alliance for Children and Families), the State of Florida (along with 38 additional states, Puerto Rico and the territories of American Samoa and the Virgin Islands), and the United States which claimed that without the ability to use Social Security and SSI benefits to reimburse the costs of foster care, states would be discouraged from serving as representative payees because of the administrative costs involved.<sup>79</sup>

<sup>74</sup> Jim Moye, "Get Your Hands Out of Their Pockets: The Case Against State Seizure of Foster Children's Social Security Benefits," *Georgetown Journal on Poverty Law & Policy*, Winter 2003, p. 5. See also "Foster Care Children Paying for Foster Care," p. 1814.

<sup>75</sup> *Ibid.*, p. 1814.

<sup>76</sup> "Picking the Pockets," p. 10.

<sup>77</sup> Brief by Children's Defense Fund, et. al, as Amici Curiae Supporting Petitioners (August 2, 2002) p. 14 in *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler*, (No. 01-1420). (Hereafter referenced as "Brief by Children's Defense Fund et al.")

<sup>78</sup> Brief by the State of Florida et al. as Amici Curiae Supporting Petitioners (August 2, 2002), p. 7 in *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler* 537 U.S. 371 (2003) (No. 01-1420).

<sup>79</sup> *Keffeler*, 537 U.S. 371 (2003), p. 18.



Some child welfare advocates express the concern that if states were not able to use SSI or Title II benefits to pay for a child's foster care room and board, then states would simply stop screening children to determine their eligibility for these programs. Screenings by child welfare staff can help to determine an individual child's needs and to secure extra benefits and services not normally available in foster care, such as housing modifications.<sup>80</sup> Eliminating these screenings would do a disservice to potentially qualified children, these advocates argue, because a child's eligibility for SSI or another Title II Social Security benefit may extend beyond his/her stay in foster care, and the benefit could provide crucial support for the child outside the system. (For instance, the benefit could offset the cost of therapeutic care to the families of children who leave care due to adoption or reunification.)<sup>81</sup> The *Keffeler* Court relied on this argument in its decision, asserting that absent this state assistance, "many eligible children would either obtain no Social Security benefits, or need some very good luck to get them."<sup>82</sup>

In addition, these advocates argue that if child SSI beneficiaries were given all of their benefits while in foster care, they might accumulate assets in the form of savings and could soon find themselves above the maximum SSI resource level of \$2,000.<sup>83</sup> This might also be the case if another type of representative payee preserved some of the child's benefits for non-maintenance expenses (not paid for out of a dedicated account), including the future costs associated with the transition to adulthood (i.e., rent deposit, vocational training, educational expenses, etc.).

## Possible Legislative Changes

The decision of the Supreme Court in 2003 upholds states' use of SSI and Social Security benefits for reimbursement of current maintenance for children in foster care. Federally enforceable changes to this practice would require congressional action.<sup>84</sup>

### The Foster Children Self-Support Act

As introduced on February 15, 2007 (by Representative Stark with seven original co-sponsors), the Foster Children Self-Support Act (H.R. 1104) would prohibit the use of SSI or Title II Social Security benefits to reimburse a state for foster care maintenance payments.<sup>85</sup> (This prohibition would apply to both federally funded and non-federally funded foster care maintenance payments.) It would also require the state child welfare agency (as a condition of receiving federal foster care funds under Title IV-E) to develop and implement procedures to

<sup>80</sup> Brief by Children's Defense Fund, et al., pp. 20-24.

<sup>81</sup> *Ibid.*, p. 22.

<sup>82</sup> *Keffeler*, 537 U.S. 371 (2003), p. 19.

<sup>83</sup> Brief by the counties of California—Los Angeles, San Bernardino, Santa Clara, Contra Costa, Alameda, Modoc, Napa, Nevada, Riverside, San Diego, Tulare—and the California State Association of Counties, as Amici Curiae Supporting Petitioners, pp. 16-18 in *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler* 537 U.S. 371 (2003) (No. 01-1420).

<sup>84</sup> The Social Security Protection Act (P.L. 108-203) provided additional safeguards for Social Security and SSI beneficiaries with representative payees and enhanced program protections. However, the legislation did not address selection of representative payees for foster children.

<sup>85</sup> For introductory remarks by Rep. Stark, see *Congressional Record*, February 15, 2007, p. E364.

- ensure that every child in foster care (for at least six months) is screened for possible eligibility for SSI or a Title II Social Security benefit;
- assist any potentially eligible child in applying for the benefits (and appealing, if necessary, a decision made about the benefit); and
- if no other “suitable candidate” is available, to apply to act as the child’s representative payee.

Under the legislation, the SSA would be required to notify the child’s attorney<sup>86</sup> or guardian ad litem regarding the appointment of a representative payee to handle a foster child’s SSI or Title II benefits. It would further permit the state, if it acts as the child’s representative payee, to retain the lesser of \$25 from or 10% of the child’s monthly benefit to pay for administrative costs. (This is consistent with the general administrative fee that may now be withheld by representative payees.)

Further, for any foster child receiving SSI or Title II benefits, H.R. 1104 would require the state child welfare agency (again as a condition of federal foster care funding) to develop a plan specific to the needs of that child and which would “conserve benefits not necessary for the immediate needs of the child” to enable the child to “achieve self-support after leaving foster care.” Any savings accumulated under the plan would not be counted for purposes of determining the child’s SSI eligibility. The plan would need to be developed and implemented in collaboration with the child (on an age-appropriate basis), the child’s social worker, representative payee, and attorney/guardian ad litem. It would need to

- determine whether the child has immediate needs for which the funds should be spent (not including maintenance payments);
- provide a strategy to conserve any benefits not needed for immediate use, in a manner that best “meets the future needs and educational and employment interests of the child”; and
- provide that if the child leaves foster care custody, the savings must be conserved and inaccessible for the child until they are to be distributed to the child on his/her 18<sup>th</sup> birthday, *unless* they are needed before that time for specified purposes (education or job skills training, personal needs assistance, special equipment, housing modification, medical treatment, and therapy or rehabilitation), any other item the Social Security Commissioner deems appropriate, or any other use approved by the Secretary of Health and Human Services as being in the child’s best interest.

The plan must be made available to the child’s attorney or guardian ad litem and the child may also request a copy. Every six months (as a part of the foster child’s status review), the plan must be reviewed and found to be meeting the requirements specified above, and a child may request modifications to the plan at the status review, during a permanency hearing, or in a separate hearing.

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<sup>86</sup> This attorney is not the child welfare agency attorney or guardian ad litem but is an individual appointed by the court to represent the child’s interest (as required in Section 106(b)(2)(A)(xiii) of the Child Abuse Prevention and Treatment Act).

Other provisions of H.R. 1104 would exempt foster children from the one-third reduction in benefits applied to SSI beneficiaries who live in the household of another person (enabling the foster child to receive the full SSI benefit regardless of cash or in-kind support received). Further, the bill would require the Government Accountability Office (GAO) to conduct a study to determine if states have established successful procedures to screen all foster children for potential SSI or Title II benefits; provided all potentially eligible children with assistance in applying for benefits (including help with appeals as necessary); and implemented procedures to identify suitable non-governmental candidates to serve as representative payees.

## Related Policy Options

Related policy changes, some of which are addressed by H.R. 1104, might include passing through some of the SSI or Title II benefits to foster children who receive such benefits, making best effort attempts to find alternative representative payees, and increasing the asset limit for youth who receive SSI.

### Pass Through Benefits

Congress could permit or require states that act as representative payees to “pass through” some or all of the SSI and Title II benefits to eligible foster children and those children could receive a portion of the benefits while in care and/or upon leaving care. Such a proposal might include a maximum amount of money available to eligible youth. For example, a maximum level could be established at \$2,000 because children receiving SSI are not permitted under current law to accumulate more than that amount. Legislation passed by California (discussed below) in 2005 requires the state to consider the feasibility and cost-effectiveness of reserving an amount up to \$2,000 to assist youth as they “age out” of foster care.<sup>87</sup>

The Temporary Assistance for Needy Families (TANF) program provides an example of how federal legislation could make more Social Security and SSI benefits available to beneficiaries in foster care.<sup>88</sup> Under current law, as amended by the Child Support Provision of the Deficit Reduction Act of 2005 (P.L. 109-171), families that participate in TANF must assign their child support rights to the state. Child support payments collected by the state (from non-custodial parents) on behalf of these TANF families are used by the state and federal governments as partial reimbursement for the welfare benefits that are provided to the family in much the same way as Social Security and SSI benefits are used to reimburse state governments for child welfare spending.<sup>89</sup> With respect to TANF families, states may choose to *pass through* some of their share of child support payments collected on behalf of the families (up to \$100 per family per month or \$200 per month if the family has two or more children) to the family. Currently, 24 states provide some sort of pass through of child support payments. This type of federal initiative, used for Social Security and SSI benefits, could result in children in foster care receiving part of these

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<sup>87</sup> 2005 Cal. Stat. 641. A copy of the legislation (AB 1633) can be found on the website of the California Assembly at [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_1601-1650/ab\\_1633\\_bill\\_20051007\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1633_bill_20051007_chaptered.pdf).

<sup>88</sup> The practice of passing through child support payments to families was originally enacted under the Aid to Families with Dependent Children (AFDC) program in 1975 (P.L. 93-647). The purpose of this practice was to fill the gap between the needs standard established by a state (or the amount the state determined that a family of a certain size would need to subsist) and the actual amount needed to subsist, if necessary.

<sup>89</sup> For more information see CRS Report RS22380, *Child Support Enforcement: Program Basics*, by Carmen Solomon-Fears.

benefits instead of being kept by the states as reimbursement for foster care expenses. However, such a program would result in costs to the states.

### Best Efforts to Find Alternative Representative Payees

Some child advocates have proposed changes to the selection of representative payees because of the perceived automatic process by which child welfare agencies are named as the payees for foster care children. First, they suggest that the current practice of providing advance notice in the selection of a representative payee for a child should be clarified because improved notice can assist SSA's efforts to name a payee other than the state.<sup>90</sup> Social Security regulations currently do not list the child or the child's attorney or *guardian ad litem* (an attorney appointed by the judge on behalf of the child) as recipients of the advance notice. According to advocates, the notice should be sent to individual(s) who represent the child in judicial proceedings, as well as the child's parents, current and past foster care or relative caretakers, other parties in the juvenile proceedings, and the juvenile court judge.<sup>91</sup> (As discussed above, H.R. 1104 would require SSA to send this notice to a foster child's attorney or guardian ad litem.)

Second, advocates argue that alternative payees not listed in the SSA preference list<sup>92</sup> should be considered as possible payees. These alternative payees include volunteer representative payee programs developed by non-profit organizations and local government agencies for adult beneficiaries requiring the service.<sup>93</sup> Court Appointed Special Advocates (CASA) could also serve as payees.<sup>94</sup> CASA volunteers are sworn in by local court systems to provide advocacy services on behalf of abused and neglected children. These volunteers may be in the optimal position to report to the court the child's needs because they advocate for the child regardless of changes in their placement goal (i.e., family preservation, family reunification, or adoption) or where the child is placed (i.e., kin and/or foster families). California's recent legislation (A.B. 1633, see below) requires counties to apply to become the representative payee if no other appropriate party is available to serve while the child is in foster care, although "appropriate party" includes only those individuals currently permitted by SSA. Similarly, H.R. 1104 would require states to apply to become the foster child's representative payee "if there is no other suitable candidate available." Although the California bill did not provide any further requirement to the counties or the state about the procedures for notifying interested parties about the representative payee selection process, the federal bill (H.R. 1104) would require notification to a foster child's attorney or guardian ad litem.

Proposals to expand the list of representative payees or to provide advance notice of selecting a representative payee to additional parties may burden SSA. Auditing individuals or non-profit organizations that serve as representative payees—rather than a large organization such as a state child welfare agency—could also strain the administrative capacity of the agency.

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<sup>90</sup> *Hearing to Review Proposals to Improve Child Protective Services before the House Committee on Ways and Means, Subcommittee on Human Resources*, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., 2006 (statement of Daniel L. Hatcher).

<sup>91</sup> "Foster Care Children Paying for Foster Care," p. 1845.

<sup>92</sup> See 20 C.F.R. §§ 404.2021 and 416.521.

<sup>93</sup> "Foster Care Children Paying for Foster Care," p. 1845.

<sup>94</sup> For additional information about the CASA Program, see CRS Report RL32976, *Child Welfare: Programs Authorized by the Victims of Child Abuse Act of 1990*, by Emilie Stoltzfus.

## Change Asset Levels

Individuals who receive SSI may not accumulate more than \$2,000 in resources. This resource limit level has been fixed since 1989, and is not indexed for inflation.<sup>95</sup> Some child advocates argue that increasing the asset level for children receiving SSI would aid those youth as they left foster care.<sup>96</sup> As proposed, H.R. 1104 would exempt assets accumulated by a foster child (under an approved plan) from the SSI eligibility determination.

Changes to the asset limit for certain children in the child welfare system would not be new. The Chafee Foster Care Independence Act (P.L. 106-169) increased the asset limit for children eligible to receive Title IV-E foster care maintenance payments. As discussed previously, eligibility for these payments is based on whether the children's original families would qualify for AFDC, as it was in effect on July 16, 1996. Under those rules, children—before the amendment by P.L. 106-169—could not remain eligible for Title IV-E services if they accumulated assets of more than \$1,000. In its report recommending this change the House Ways and Means Committee noted:

Children in foster care have a special need for resources. Unlike children reared in families, these children often have little or no support from relatives. Thus, when they turn age 18 and are no longer eligible for government foster care payments, they are on their own. Under current law, these adolescents cannot accumulate more than \$1,000 in assets and still remain eligible for Federal foster care payments. The Committee believes children in foster care should be allowed to accumulate a much higher level of assets to prepare for the day when they must support themselves. Thus, we are increasing the asset limit to \$10,000.<sup>97</sup>

By contrast, under the SSI program, individuals are generally no longer eligible once they attain \$2,000 in countable resources. However, two initiatives allow eligible recipients to accumulate assets above that limit. These are the SSI initiative Plans for Achieving Self Support (PASS) and, separately, Individual Development Accounts (IDAs). Either one of these might be modified to include provisions that target recipients in foster care.

### *Plans for Achieving Self-Support (PASS)*

A Plan for Achieving Self-Support (PASS) is an individual plan for employment designed by an SSI beneficiary with the assistance of a state vocational rehabilitation agency, disability service organization or Ticket to Work Employment Network and approved by the SSA. A PASS must include a specific goal for employment, such as a specific job type desired or a plan for setting up a small business and must include a time line for achieving the employment goal. The PASS must also include a list and cost of any goods, such as assistive devices or job-specific tools, or services, such as schooling, that will be needed by the beneficiary to achieve his or her goal.

Resources included in an approved PASS are not counted against the SSI resource limits. There is no limit to the amount of resources that can be excluded as part of a PASS and these resources can include money set aside to pay for elements of the PASS such as training or items purchased as part of the PASS such as assistive technology devices.

<sup>95</sup> 42 U.S.C. § 1382(a).

<sup>96</sup> "Foster Care Children Paying for Foster Care," p. 1846.

<sup>97</sup> U.S. Congress, House Committee on Ways and Means, *Foster Care Independence Act of 1999*, report to accompany H.R. 1802, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess., H.Rept. 106-182, (Washington: GPO 1999), p. 29.

## *Individual Development Accounts (IDAs)*

Individual Development Accounts (IDAs) are matched savings accounts that allow families and persons with low incomes to set aside money for education, the purchase of a home, or the creation of a business.<sup>98</sup> An individual may place money from his or her earnings into an IDA and have that amount of money matched by the state with funds from the state's Temporary Assistance for Needy Families (TANF) block grant or by certain state and local government agencies or non-profit organizations.<sup>99</sup>

Money saved in a qualified IDA, including the state contribution and any interest earned, is not counted as a resource for the purposes of determining SSI eligibility.<sup>100</sup> There is no limit to the amount of money in an IDA that can be excluded from the SSI resource calculation. However, there are limits to the amounts states and other entities can contribute to IDAs.<sup>101</sup>

## State Initiatives

Most, if not all, states use some Social Security or SSI benefits to partially fund their foster care agencies. California appears to be the only state that has passed legislation (Assembly Bill 1633, 2005) to change its procedures for screening foster care children and funding child welfare through Social Security and SSI benefits since the *Keffeler* decision.<sup>102</sup> New Mexico has also proposed legislation to screen youth in care, but the bill was not reported out of committee.

### California Assembly Bill 1633

In October 2005, Governor Arnold Schwarzenegger signed into law Assembly Bill 1633 (AB 1633). This new law created the "Foster Care Social Security and Supplemental Security Income Assistance Program." Like the current pending federal legislation (H.R. 1104), the California-enacted bill requires the state to screen youth for SSI or Social Security benefits and provides that they are to act as the child's representative payee only if no other appropriate party is available to serve while the child is in foster care. However, *unlike* the federal proposal (H.R. 1104), the state-enacted bill allows California counties to continue using those benefits received by foster children to pay for the children's current maintenance costs.

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<sup>98</sup> For additional information on IDAs see CRS Report RS22185, *Individual Development Accounts (IDAs): Background and Current Legislation for Federal Grant Programs to Help Low-Income Families Save*, by Gene Falk (hereafter cited as CRS Report RS22185, *Individual Development Accounts (IDAs): Background and Current Legislation for Federal Grant Programs to Help Low-Income Families Save*, by Gene Falk).

<sup>99</sup> Under the provisions of the Assets for Independence Act, P.L. 105-285, non-profit organizations and state, local, or tribal governments may compete for grants to fund IDAs for low-income households. IDAs funded through this program are often called Demonstration Project IDAs while IDAs funded through the TANF program are often referred to as TANF IDAs.

<sup>100</sup> There are other types of IDAs that are targeted to specific groups, including refugees and persons living in assisted housing. However, only TANF and Demonstration Project IDAs are exempt from the SSI resource rules.

<sup>101</sup> For additional information on these limits, see CRS Report RS22185, *Individual Development Accounts (IDAs): Background and Current Legislation for Federal Grant Programs to Help Low-Income Families Save*, by Gene Falk.

<sup>102</sup> Based on CRS communications with the National Conference of State Legislatures in November 2006.

The California law (AB 1633) provides that all counties screen all youth in foster care for federal SSI and Social Security benefits, as well as the State Supplementary Payment (SSP). The counties are to apply to become the representative payee for qualified youth only if only if no other appropriate party is available to serve while the child is in foster care.<sup>103</sup> The new law requires that counties serving as representative payees establish two types of accounts for foster care youth receiving SSI and Social Security benefits. One is a no-cost, interest-bearing maintenance account, with the county maintaining an itemized current account of all income and expense items. (This type of account is not required under federal law, and some California counties established such an account, or a similar type of account, prior to the passage of AB 1633.) The county must establish procedures for dispensing money from the account to pay for expenditures that are used by and for the benefit of the child, and for purposes determined by the county to be in the child's best interests.<sup>104</sup> Procedures must also be established for disbursing any balance when the youth is released from care.

The other account—a dedicated account—is a depository for SSI payments that are past due for at least six months (and is required under federal law, as discussed above). Allowable expenses from this account include those for medical treatment, education or job skills training, personal needs assistance, special equipment, housing modification, therapy or rehabilitation, or other items or services deemed appropriate by the Social Security Administration. Pursuant to federal law, funds may not be disbursed for basic maintenance costs.

The county is also required to provide information to SSI beneficiaries in foster care who are approaching their 18<sup>th</sup> birthday, about (1) establishing continuing eligibility for receipt of SSI as an adult, if necessary; (2) the process of becoming their own payees, or designating an appropriate payee if benefits continue beyond their 18<sup>th</sup> birthday; and (3) any SSI benefits that have accumulated in their accounts.

## Best Practice Guidelines

A.B. 1633 provides that the California Department of Social Services convene a work group to develop non-binding best practice guidelines for county welfare departments that will assist children in custody who are eligible for Social Security or SSI benefits and to ensure that eligible youth receive benefits before exiting care. The work group, comprised of state and county child welfare officials, advocacy organizations, and current and former foster youth, was convened in 2006. Recommendations made in the guidelines were issued an All County Letter (ACL) in February 2007.<sup>105</sup>

First, the guidelines establish procedures for screening all youth in foster care for SSI and other Social Security benefits. For children who may be eligible for Title II benefits, an application should be made to SSA on their behalf. The counties should apply to become the representative

<sup>103</sup> California law requires that counties be selected as the representative payee only if no other appropriate person is available. See Cal. Welf. and Inst. Code § 13754. This is consistent with federal regulations about the order of selecting representative payees. See 20 C.F.R. §§ 404.2021 and 416.521.

<sup>104</sup> The definition of “best interests” is consistent with the Social Security Act’s regulations that define the best interest of the beneficiary payments as those used for current maintenance, or the costs incurred in obtaining food, shelter, clothing, medical care and personal comfort items. See 20 C.F.R. §§ 416.635 and 416.640.

<sup>105</sup> The guidelines are available at <http://www.pilpca.org/docs/ACL%2007-09%20-%20implementing%20AB%201633.pdf>.

payees, if appropriate, for children already receiving any Title II benefits. Separately, the guidelines advise that within three months of entering care, a social worker or other individual familiar with the child, evaluates the child's physical or mental impairments to determine eligibility for SSI. If youth are screened by the county and the results indicate that the child would not be eligible for SSI, a due date is to be set for the child's next annual screening. The guidelines establish procedures for rescreening youth at least annually or whenever there is a change in circumstances (e.g., change of placement, change in physical or emotional condition).

The guidelines further specify that if the results of the initial screening are affirmative (that the child would likely be eligible for SSI benefits), the child is to be referred to the county-designated SSI liaison for determining whether the application to SSA should be made. The guidelines recommend that a liaison be established in each county to conduct a disability assessment, comprised of referrals to various medical and psychological evaluations, and that documentation be made to substantiate any disability. The assessment should be completed within nine months. However, youth who are age 16½ or older, or meet other criteria (e.g., children with presumptive disabilities, children who will exit foster care in less than a year) receive expedited consideration due to SSA's sometimes lengthy application review process.<sup>106</sup>

The SSI liaison also determines whether the SSI application would be financially advantageous for the child, family, and/or county. **Figure A-1** in the **Appendix** shows the decision points that counties should consider when determining whether to make the application for children. These are based on the county's share of cost for a child eligible for Social Security and SSI, the child's eligibility for Title IV-E foster care maintenance payments and CalWORKS (the state's cash aid program for low-income families), and the child's permanency plan (i.e., emancipation, reunification, adoption, and guardianship). According to the guidelines, the child's best interests are paramount to any financial considerations for the county and state.

Upon determining that the county should apply for SSI on behalf of the youth, the county is advised to contact SSA for an appointment and file for the benefit within 60 days of the initial contact. The liaison should be responsible for coordinating all appeals to SSA for rejected applications.

### *Youth Emancipating From Care*

The work group is tasked with making recommendations about reserving a portion of SSI benefits for youth to be used upon leaving care, rather than for their foster care and current maintenance. The guidelines' provided suggestions to counties to assist emancipating youth.

The guidelines suggest how counties can assist youth in applying for benefits to continue beyond his or her 18<sup>th</sup> birthday as well as to provide information at that time about the process for the youth to become his or her own payee or to designate a representative. The guidelines encourage counties to determine whether to apply for SSI benefits on behalf of Title IV-E eligible youth "aging out" of foster care. SSA will not accept applications for these youth until one month prior to the termination of Title IV-E benefits. This time frame may preclude youth from securing

<sup>106</sup> Pending legislation in the California Legislature—AB1331—would require counties to screen all youth in foster care ages 16.5 or older for SSI eligibility and to apply, on behalf of eligible youth, for SSI benefits. It would also require counties to set aside up to \$2,000 in a "maintenance account" for all youth receiving SSI benefits while they are in care to meet their needs upon emancipation.



benefits before emancipation because the application process generally exceeds one month. The California Department of Social Services and the working group are continuing to identify solutions to resolve this timing issue.

For youth who have transitioned out of foster care without SSI benefits in place, the guidelines advise that counties attempt to maintain contact with the youth and track their progress toward gaining SSI benefits. They also suggest how the counties can inform parents and caretakers about filing for SSI upon leaving care. The California Department of Social Services is developing brochures for youth and parents that outline how the SSI program works.

According to the guidelines, counties may consider providing the following services to potentially SSI-eligible youth who have “aged out” of care:

- post-foster care or independent living program workers could assist with the SSI application process, including appeals;
- involve a responsible adult in the child’s application process;
- make arrangements with local legal service agencies to provide counsel to emancipated youth on SSI application matters; and
- refer youth to appropriate adult social services.

### **New Mexico Senate Bill 273**

The New Mexico legislature has also considered changes to screening for SSI and Title II. In 2005, Senate Bill 273 was introduced to establish a program to screen for Social Security and SSI benefits all children in foster care within six months of entering the state’s care and apply for these benefits on behalf for children likely to be eligible.<sup>107</sup> Senate Bill 273 did not pass committee.

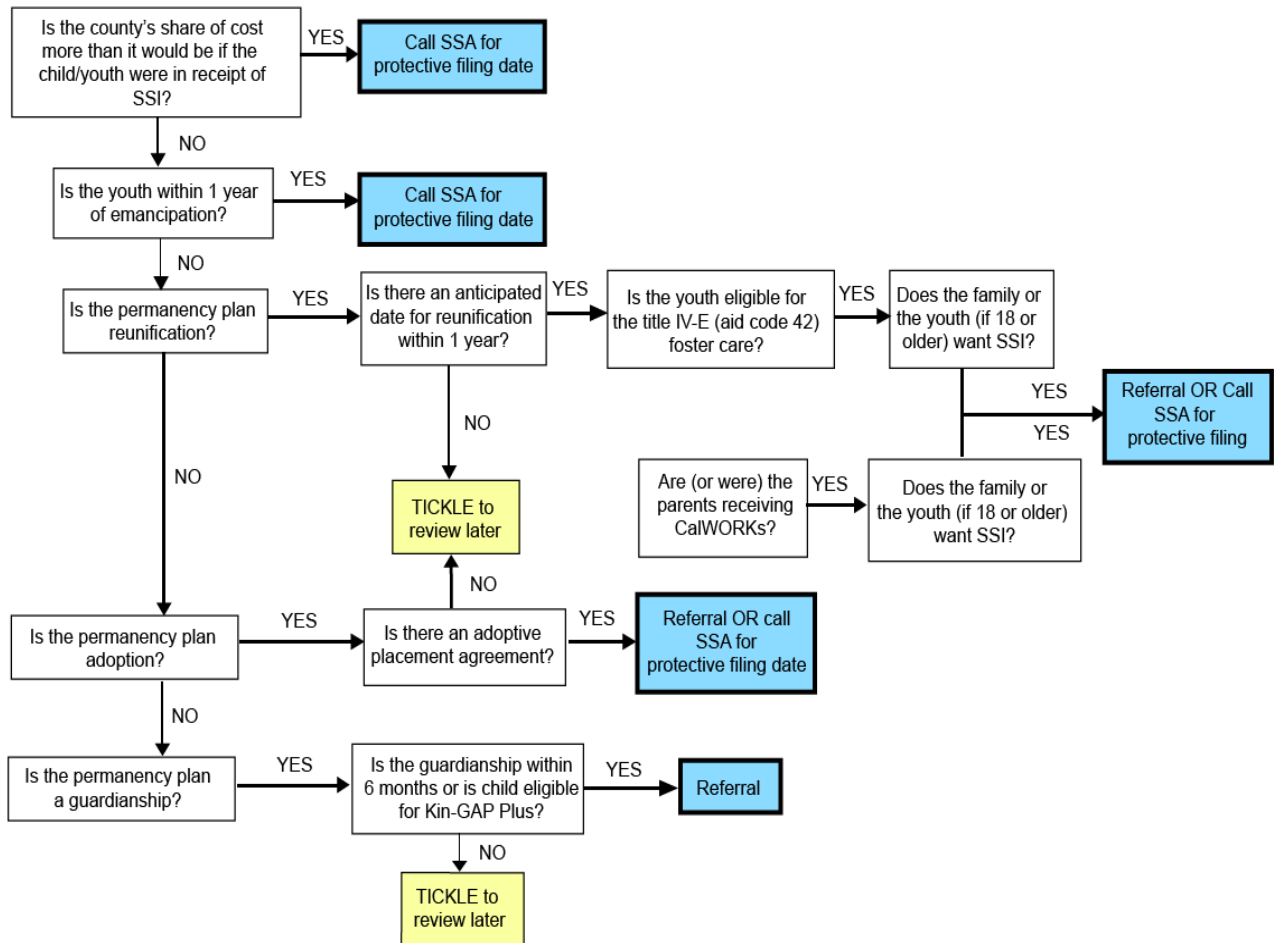
Senate Bill 273 would have required the state to request reconsideration and timely appeal of adverse decisions when appropriate. Like AB 1633, the legislation would have established no-cost, interest-bearing accounts for youth in care for whom the state served as representative payee. SSI or other Social Security benefits could have been applied for the use and benefit of the child; for purposes determined to be in the child’s best interest; and in accordance with a written assessment of the child’s individual needs, provided that each child receive a personal allowance of at least \$30 each month for his or her personal use. In addition, eligible youth emancipating from care would have received SSI or other Social Security payments disbursed to the state on behalf of the youth beginning ninety days prior to their eighteenth birthday.

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<sup>107</sup> A copy of Senate Bill 273 can be found on the website of the New Mexico Legislature at <http://legis.state.nm.us/Sessions/05%20Regular/bills/senate/SB0273.pdf>. New Mexico introduced nearly identical legislation (House Bill 890) in 2003. The legislation passed the House, but no action was taken on the bill in the Senate.

# Appendix. California Application Tool

**Figure A-1. Tool for California Counties to Determine Whether to File an Application with SSA**



**Source:** CRS figure based on Best Practices Assembly Bill 1633 Work Group, *Draft Best Practice Guidelines for Screening and Providing for Foster Children with Disabilities*, 2007.

**Note:** “TICKLE” is a term used in government child welfare publications as a reminder for child welfare employees to reexamine at a later date whether a procedure should be implemented or an application filed on behalf of a child in question. In this context, TICKLE serves as a reminder for county child welfare employees to reconsider whether to apply for SSI for a foster child.

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